

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 76
3020251

BETWEEN A LABOUR INSPECTOR
Applicant

AND WAYS ELECTRONICS
LIMITED
First Respondent

AND SHOBHIT SAINI
Second Respondent

Member of Authority: M B Loftus

Representatives: Jessica Ellison, Counsel for Applicant
Digby Livingston and Digby George Livingston,
Advocates for Respondents

Investigation Meeting: 5 April 2018 at Wellington

Submissions Received: 13 April and 4 May 2018 from Applicant
24 April 2018 from Respondent

Determination: 31 August 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The application as originally lodged contained the normal range of issues normally seen in matters initiated by a Labour Inspector such as claims of an underpayment of wages, sick leave and holiday pay; failure to maintain appropriate records and failure to provide written employment agreements. The Inspector sought rectification of those issues, along with penalties.

[2] Since then and given acceptance by the respondent, Ways Electronics Limited (Ways), that its process were less than adequate it sought advice in respect to the

record keeping. Those deficiencies along with some of the wage issues have now been addressed.

[3] As a result only two matters remain to be determined by the Authority. The first is the question of whether or not four individuals the Inspector represents were actually employees for the entire tenure of their relationship with Ways who says they were, for part of it, volunteers.

[4] The second is the application for penalties though neither party has yet addressed that in submission with both waiting to see what eventuated here and the extent of the breaches to which penalties potentially apply.

Background

[5] Ways operates a business repairing small electronic items such as phones, tablets and laptops. The second respondent, Shobhit Saini, is its sole director and one of two shareholders. He is cited as a person involved in the breaches pursuant to s 142W(1)(c) of the Employment Relations Act 2000 (the Act).

[6] The inspector became interested in Ways after receiving a complaint from one of its staff that there were multiple breaches of minimum employment standards. An investigation followed which saw the Inspector conclude, as alleged, that multiple breaches had occurred.

[7] In addition there was the issue of four individuals Ways considered it had engaged as *volunteer trainees*. Each had signed a document headed *Individual Employment Contract Schedule*. It opens by stating *Conditions of Employment are governed by the Employment Agreement ...*

[8] The Agreement, a copy of which three of the four signed, identifies them as occupying the position of Volunteer Trainee Technician before advising:

This volunteer role can lead to a contracted role for minimum period of 3 years if selected after completion of training period (normally 6 weeks)...

And

After 6 weeks training in finished and if employee is hired as a technician then the employee will be paid on a commission basis for the contracted jobs performed during the period.

[9] During the period of these engagements each of the four was unpaid and as events transpired only one moved on to paid employment with Ways.

[10] Subsequent discussion, including mediation, saw Ways concede a number of the claims and various payments followed. That left the two issues which still require resolution.

Determination

[11] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[12] As already said two issues remain though only one will be determined at this point. That is the question of whether or not those engaged on the volunteer agreements were, in reality, employees.

[13] The Inspector claims each of the four was an employee throughout. Ways disagrees and says they were volunteers completing a training period which may or may not have led to a subsequent offer of employment. For some it did but not all.

[14] The period of *voluntary* engagement varied with the unpaid engagements ranging from three to ten weeks.

[15] Determination of this issue will revolve around a determination as to whether or not those the Inspector represents were, while engaged as unpaid trainees, volunteers or not.

[16] A volunteer is someone who does not expect to be rewarded for the work performed and receives no reward for that work.¹

[17] Where there is dispute and/or ambiguity about the appropriate status an application may be made for determination of the issue as has occurred here. In determining whether a person to whom the application applies is an employee or not the Court or the Authority (as the case may be) must examine the real nature of the relationship,² including any matters that indicate the intention of the parties and is not

¹ Section 6(1)(c) of the Employment Relations Act 2000

² Section 6(2) of the Employment Relations Act 2000

to treat as a determining matter any statement that describe the nature of the relationship (ie: the agreements).³

[18] As was said by the Inspector this means I should question:

- a. Does the person do any work for the employer?
- b. Does the person expect to be rewarded for the work they do?
- c. Does the person in fact receive hire or reward for the work they do?
- d. What is the real nature of the relationship?
- e. Are there any other relevant matters to be taken into account?

[19] So to the first question – did those the Inspector represents perform work? Work is not defined by the Act though there are a number of indicators as to the type of issues I should consider in the ‘sleepover cases’⁴ and the *Salad Bowl*⁵ case. The determination will revolve around issue such as level of control, freedom and whether or not the workers were producing outcomes profitable to the employer.

[20] With one partial exception who could alter his hours so as to accommodate a second job, the evidence shows each of the four worked as directed by Ways. Each also performed functions from which Ways could profit by either serving at the front counter, repairing equipment or both. Each also performed the same function as a paid colleague using tools provided by Ways and the evidence of the two who did progress to paid employment is nothing changed. As stated in submission the evidence is each was ... *an integral part of the business and presented as such to third parties e.g. customers.*⁶ I also note Ways carried the cost of and responsibility for any errors made by the four.

[21] The conclusion I reach is this was work. The evidence is training, such as it was, was negligible yet each of the four quickly moved into a situation where he was performing functions from which Ways profited with little oversight but in an

³ Section 6(3) of the Employment Relations Act 2000

⁴ *Idea Services v Dickson* [2011] ERNZ 192 (CA) and *Law v Board of Trustees of Woodford House and Trustees of Iona College* [2014] ERNZ 576 (EmpC).

⁵ *Salad Bowl Ltd v Howe-Thornley* [2013] ERNZ 3126 (EmpC)

⁶ Closing submission at [11]

environment in which Ways exercised significant control as to what, where, when and how the work was done.

[22] I note also Mr Siani referred in evidence to various misdemeanours and now implies it was, at last for two of them, their conduct that meant they remained volunteers. That does not sit well with and undermines the argument they were volunteers for the purpose of training which would see their skills raised to a level where they became employable.

[23] With respect to expectation I note that while the situation of each of the four differed there are again significant similarities. Each responded to an advertisement which sought applicants for the role of *Part Time Job IT/Electronic Technician* for which full training would be provided by Ways. There is no mention of an unpaid voluntary status. Notwithstanding that three of the four were then asked to sign the agreement referred to in [8] above. It is fair to say the agreement could be easily misconstrued and is a possible source of confusion as while it mentions a voluntary training period it is also littered with references to employment and contains restraint of trade provisions.

[24] It is clear each expected to enter paid work and while, after the interview they were either presented an ambiguous document or understood they would initially be unpaid trainees each expected this to last a short time and each expected payment in due course.

[25] While Mr Saini now claims none was qualified to carry out the work and was unable to answer basic question about electronics the evidence is each reached a level which he understood would entitle him to payment within a short time. I also note two had experience in electronics which undermines the claims they lacked the skills required of a paid employee upon commencement. One had a diploma in computer and science engineering. He had already worked in the industry and moved to managing Ways front counter after a week though was not then paid. Another had an electronics degree and while he was never paid he was offered a reference.

[26] A third was offered paid employment after some two months having raised the issue but ultimately refused due to what he saw as an inadequate salary. The fourth never signed the volunteer agreement and while he says he understood he would initially be a volunteer trainee he would be paid when deemed capable of doing the

jobs. He says he was advised he had reached an acceptable level after a week and a half but as payment was not forthcoming he sought other employment.

[27] Having applied for paid employment they were coerced into the trainee arrangement by virtue of a combination of a lack of understanding and a desire to find an avenue through which they might advance their efforts to stay and work in New Zealand. The evidence is each was then taken advantage of and continued to be treated as a volunteer past a point at which they would have expected to be paid.

[28] Were they actually rewarded? Two were offered paid employment with no change of function or responsibility. One was offered a reference which would be beneficial to him in advancing his endeavours to stay in New Zealand. In his eyes that was a reward.

[29] The evidence also shows all received non-monetary rewards in respect to training, albeit limited, upskilling to a greater or lesser extent, the chance to add to their cv, a reference, and possible advantages in respect to their visa status.

[30] In respect to other issues there are questions such as bargaining power. Aside from evidence Mr Saini tried to avoid and delay discussions about moving these workers to paid employment I again note each applied for paid employment. Having done so they were coerced into the trainee arrangement by virtue of a combination of a lack of understanding, misrepresented undertaking about their future and a desire to find an avenue through which they might advance their efforts to stay and work in New Zealand. The evidence is each was then taken advantage of and continued to be treated as a volunteer past a point at which they would have expected to be paid. They were in a weak position and the evidence is Ways took advantage of that.

[31] Having balanced the evidence, and the tests, I conclude each of the four were employees and should have been treated as such from commencement. The situation is, I consider, well summarised by Ms Ellison when she says:

Fundamentally, the unpaid trainees entered into their dealings with the respondents for reward — that is, they came to the work through a job advertisement for paid work, and then went on to work for the hire or reward promised by the respondents. They were not working for a "cause" or for a charity or community group. They were working for a person, who was operating a for-profit business and directly benefited from the work of the unpaid trainees, and their reward was in the form of an individual and personal benefit — the chance of continued employment which in

turn could lead to a work visa in New Zealand, a reference and upskilling.⁷

[32] The second issue is whether or not Ways should have penalties levied against it. As already said neither party chose to address this as the number of potential breaches could not be ascertained until it was determined whether or not those the Inspector represents were employees. Indeed both stated they would await the outcome before making submissions about penalties.⁸

[33] The inspector, in the original statement of problem, claimed penalties for:

- a. A failure to pay four employees the minimum adult wage as required by s 6 of the Minimum Wage Act 1893;
- b. A failure to keep complaint records which specified the number of hours worked each day in a pay period and the resulting pay as required by section 130(1)(g) of the Employment Relations Act 2000. This breach is claimed in respect to two employees;
- c. A failure to keep complaint holiday and leave records as required by s 81 of the Holidays Act 2003. This breach is claimed in respect to one employee;
- d. A failure to pay not less than an employees' relevant daily pay or average daily pay when that employee took a public holiday (s 49 of the Holidays Act). This claim applies to one employee;
- e. A failure to pay not less than time and a half when an employee worked on a public holiday (s 50 of the Holidays Act) and again applying to one employee;
- f. A failure to pay not less than an employees' relevant daily pay or average daily pay for an alternate holiday upon cessation (s 60 of the Holidays Act). Again one employee;

⁷ Closing submission dated 13 April 2018 at [100]

⁸ Applicants submission dated 13 April 2018 at [103] and submission of 4 May 2018 at [9]; respondents submission of 24 April at [5.1]

- g. A failure to provide and keep a written employment agreements for one employee as required by s 64(1) of the Employment Relations Act;
- h. A failure to pay an employee sick leave as required by s 71 of the Holidays Act; and
- i. A failure to pay monies owing for holidays in respect to an incomplete year of employment (s 23 of the Holidays Act).

[34] It follows that the finding each of the workers was an employee means it is highly likely all of the above breaches have occurred. There also remains a question about quantification of the wages owing for the various periods. Was deemed each employee a volunteer as well as the extent of Mr Saini's personal liability.

[35] Unless an approach is made to alter the following timetable the parties are now to provide their submissions on remedies and penalties as follows:

- a. Applicant by 21 September 2018
- b. Respondent by 10 October 2018
- c. Applicant's reply by 19 October 2018

Conclusion

[36] For the above reason I conclude those the Inspector represents were employees during the period in which Ways purported to engage them as volunteer trainees.

[37] The parties are to provide submissions on remedies and penalties in accordance with the timetable in paragraph [35] above.

[38] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority